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IN THE

Supreme Court of the United States

October Term, 1964

No. 701

JEROME ROSENBERG,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner, Jerome Rosenberg, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this capital case as hereinafter described.

Opinion Below

The opinion of the Court of Appeals, printed as Appendix A hereto, *infra,* is reported in 15 N.Y. 2d 235, 257 N.Y.S. 2d 931.

Jurisdiction

The judgment or decision of the Court of Appeals of the State of New York here sought to be reviewed bears date, under the "remittitur" practice of that Court, of March 11,

1965; its filing date in the trial Court is March 26, 1965; the remittitur was amended, to show the presentation and decision of Federal questions, on April 22, 1965 (see Appendices B and C hereto, *infra*). The judgment or decision affirmed, by a *per curiam* opinion (Appendix A hereto, *infra*), a judgment of conviction and order of execution rendered on February 18, 1963 by the Supreme Court of New York, Kings County (Honorable Samuel S. Leibowitz, J.), the petitioner having been convicted, after a jury trial, of two counts of murder in the first degree, the verdict being felony murder without a recommendation of mercy; the minutes of sentence and the order of execution appear in the printed "Record On Appeal" (which was printed for the appeal in the Court below) at pp. 61-64,* and they are printed in Appendix D hereto, *infra*.

As is more fully recited *infra*, petitioner Rosenberg duly preserved, in the State Courts, the Federal constitutional questions as to which we here seek certiorari, with the exception of our "Questions Presented" No. 3, *infra*, which arises from certain intervening decisions of this Court (*infra*).

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* The certified Record which we are filing in this Court consists of the above mentioned printed Record On Appeal, a printed "Supplemental Record On Appeal", certain typewritten stenographic minutes (916 pages) of the voir dire for the selection of the trial jury, and the appropriate additional papers of the appellate proceedings in the Court below. We note that in the companion petition for certiorari herein of the co-defendant Portelli the references to the printed Record On Appeal seem to be to the "folio" numbers; our references in this petition are to the *page* numbers; of that printed Record. We have not been able to obtain sufficient extra copies of the printed Record and Supplemental Record in the Court below to supply nine additional copies to this Court, but we are expecting to obtain one or two extra copies which we shall send to the Clerk. No extra copies of the typewritten minutes of the Jury voir dire are available.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3),* since the petitioner is claiming rights, privileges or immunities under the Sixth and Fourteenth Amendments confrontation of witnesses, (due process of law and fair and impartial court and jury) of the Constitution of the United States.

Questions Presented

Petitioner was convicted and sentenced to death for felony murder allegedly committed in an armed robbery in which two New York City police detectives were fatally shot. The State does not claim that petitioner did the shooting, but that the co-defendant Portelli did. Identification of petitioner Rosenberg as having been present at the robbery and shooting was by a single witness and was based upon a fleeting and incomplete observation, the remainder of the proofs against petitioner being entirely circumstantial. The questions are:

1. Was petitioner denied due process of law and a fair trial by the admission in evidence of testimony by a witness named Richard Melville who had been savagely beaten by the police to coerce him to inculpate the defendants?

2. Was petitioner denied due process of law and a fair trial on the issue of his guilt or innocence by errors in the instructions to the Jury and by rulings and remarks of the Trial Judge which were not only prejudicially unfair but which, taken as a whole, were seemingly designed to militate in favor of a conviction? Was petitioner thereby

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* Also under Rule 22, sub-division 1, of the Rules of this Court.

denied his due process right to be tried by a fair and impartial tribunal?

3. In connection with the above mentioned testimony of the witness Melville, which purported to recite guilty admissions by the co-defendant Portelli that were inculpative of petitioner as well, was petitioner denied his Sixth and Fourteenth Amendment rights of confrontation? (Not raised below, but sought to be raised here on the basis of *Pointer* v. *Texas,* U.S. , 13 L. Ed. 2d 923 and *Douglas* v. *Alabama,* U.S. , 13 L. Ed. 2d 934, both cases decided April 5, 1965).

4. Was petitioner denied his due process right to be tried by a fair and impartial jury and his right of a fair due process opportunity to receive a jury recommendation of mercy upon a conviction of felony murder? Was the trial jury selected by an unconstitutional procedure aimed at excluding persons who might have a truly objective attitude about a recommendation of mercy and, specifically, aimed at excluding persons of the same ethnic or racial background as the respective defendants?

5. Petitioner respectfully adopts, insofar as pertinent to his case, the additional questions presented in the companion petition of Portelli.

Constitutional Provisions and Statutes Involved

The case involves constitutional questions of due process of law (Fourteenth Amendment) and of the right of confrontation (Sixth and Fourteenth Amendments).

It also involves the New York State felony murder law (N.Y. Penal Law §1044, subd. 2) and the New York State statutory procedure (as it stood at the time of the sentencing herein) whereby a jury in a felony murder case might recommend life imprisonment rather than death (former N.Y. Penal Law §1045-a). These statutes are quoted in Appendix E hereto, *infra*.

Statement of the Case and of How the Federal Questions Are Presented

On the afternoon of May 18, 1962, two New York City police detectives were fatally shot in an armed robbery of a wholesale tobacco store in Brooklyn, N. Y. Persons present in the store at the time of the holdup and shooting testified that two men were involved. The petitioner Rosenberg and Portelli (who is filing a companion petition herein) were indicted, convicted and sentenced to death for this crime; a third defendant, Dellernia, obtained a mistrial. The Court below affirmed the convictions.

The case against petitioner Rosenberg individually rested upon only one item of direct evidence, plus circumstantial evidence. The direct evidence consisted of an alleged eyewitness identification of Rosenberg by David Goldberg, a partner of the business where the holdup and shootings occurred.* Goldberg's identification testimony, however, was undeniably of a rather weak kind. He said that he saw Rosenberg's face fleetingly during an instant when a handkerchief which the person in question had been holding up to his face was lifted away. Cross-examination brought out

* Rosenberg is not accused of doing the shooting, but of having participated in the robbery.

several questionable factors in Goldberg's identification testimony, including that he had seen a police photograph and newspaper pictures of Rosenberg before he had ever identified the latter at a police lineup. The pertinent portions of Goldberg's testimony appear at R. 187-198, 200-205, 239-241, 246-248.

The circumstantial evidence against Rosenberg included testimony that he had been seen in the neighborhood of the crime immediately after its commission, and that a pair of sunglasses and a rag used for disguise by one of the holdup men were found in a garbage can near where Rosenberg was seen right after the crime (R. 253-254, 300-305, 371-375, 719-720); that earlier that day Rosenberg had spoken, in the hearing of one Louis Ferrara, about a prospective robbery (R. 713-714); and that Rosenberg had driven in a car with Portelli and a third defendant (Dellernia) to the vicinity of the tobacco store shortly prior to the crime (R. 891, 893-900)—this last testimony was by a girl named Linda Manzione, whose testimony was received primarily against the defendant Dellernia, and it is noteworthy that in the retrial of the latter (after his mistrial herein) he was acquitted.

The additional testimony of Richard Melville—the testimony which had been elicited by brutal police beatings—is described under our "Reasons For Granting the Writ", *infra.*

Rosenberg did not introduce any evidence in his defense.

The defense moved to dismiss the indictment for failure to prove a *prima facie* case (R. 1061), and it moved for acquittal at the end of the entire proofs (R. 1215 et seq.). It also moved to set aside the verdict and for arrest of judgment (R. 1436). These motions imported the conten-

tion that Rosenberg's guilt had not been proved in view of the weak testimony of identification.

Under the practice of direct appeal to the Court of Appeals of the State of New York in cases of death sentence (*N.Y. Const.*, Art. 6, §7; *N.Y. Code Crim. Proc.*, §517), there is plenary review on issues of both fact and law (*People* v. *Crum*, 272 N.Y. 348, 6 N.E. 2d 51 (1936)). This plenary review in capital cases is available "whether any exceptions shall have been taken or not in the Court below" (N.Y. Code Crim. Proc. §528; *People* v. *Nelson*, 189 N.Y. 137, 81 N.E. 768 (1907)). In petitioner Rosenberg's appeal herein to the Court of Appeals of the State of New York he raised all of the points urged in this petition for certiorari except our "Question Presented" No. 3, *supra*, which rests upon intervening decisions of this Court rendered since the date of the judgment below which is here sought to be reviewed; see the item numbered "III" in our "Reasons for Granting the Writ", *infra*. As to our Question Presented No. 1 herein—relating to the physically coerced testimony of the witness Melville, this was raised as Point III in our printed brief in the Court below, it was passed upon in the per curiam opinion below (Appendix A, hereto, *infra*), and it was noted in the amended remittitur as having been raised and passed upon by the Court of Appeals as a Federal constitutional question (Appendix B, hereto, *infra*). As to our Question Presented No. 2 herein—relating to the prejudicial conduct of the Trial Judge—this was extensively argued *passim* throughout our printed brief in the Court below, especially at pp. 5-7 and in Points I, II, III and VIII of that brief, and the amended remittitur states that the defense urged "other errors in the conduct

and rulings at the trial" and that "The Court of Appeals held that no constitutional rights of appellants had been violated" (Appendix B, hereto, *infra*). As to our Question Presented No. 3 herein, this is the point here being raised for the first time, on the basis of intervening decisions of this Court, concerning denial of the constitutional right of confrontation. As to our Question Presented No. 4 herein—relating to improper selection of the trial jury—this was argued in Point VIII of our printed brief in the Court below, and it is covered by the language of the amended remittitur above noted in connection with our Question Presented No. 2 herein. As to our Question Presented No. 5 herein—adopting points urged herein in the companion petition of Portelli—we preserved such adoptive points in Points III, VI, VII and VIII of our printed brief in the Court below, we refer again to the amended remittitur, and we refer also to the showing in the companion petition herein as to the preservation of such points in the Court below.

Additional facts relating to the respective points herein urged as meriting certiorari are presented at appropriate places *infra* in our "Reasons for Granting the Writ".

The Court below, in affirming the conviction, discussed in its *per curiam* opinion only the point relating to the coerced testimony of the witness Melville, finding that while " * * * we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melville testified", no prejudice had occurred because Melville had stated on the witness stand in his trial that his testimony was true, and "The requirements of law are met if the fact of such earlier coercion or other official lawlessness

is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open Court is truthful and worthy of consideration"; the Court of Appeals also held in its *per curiam* opinion that "The proof adduced upon the trial is more than sufficient to support the jury's verdict that the defendants are guilty of felony murder and * * * we find no errors of law * * * *" (Appendix A hereto, *infra*). The judgment of the Court below affirming the conviction was unanimous (*ibid.*).

The sentence of death is stayed pending this certiorari proceeding.

Reasons for Granting the Writ

I.

In the companion petition herein on behalf of Portelli the facts of the savage and brutal police beating administered to the witness Richard Melville to force him to inculpate the defendants are recited in detail. The *per curiam* opinion below evidently accepted these facts as established and noted also that Melville declared he had given the police his story " * * * only after he had been held in custody overnight and severely beaten and tortured and that he would not have talked to the police had they not coerced him in this manner" (Appendix A hereto, *infra*). Nevertheless, as we noted in our Statement of the Case, supra, the Court below was of the view that Melville's adoption on the witness stand in this trial of his pretrial statement to the police as true was dispositive. The Court below distinguished between such a situation involving a

non-defendant witness, and out-of-court confessions coerced from a defendant and sought to be used against him on the trial, saying that "While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury"—citing 3 *Wigmore, Evidence* [3d Ed., 1940], §815, pp. 230-231.

In this case of first degree murder with sentence of death, where we have at the most only one merest shred of "hard" evidence against Rosenberg,* fairness and justice require that the closest appellate scrutiny be devoted to ascertaining whether the scales in this trial were unlawfully tipped against Rosenberg by the obtrusion of any improperly received evidence, or by any misconduct of the prosecutor or the Trial Judge. We submit that precisely such a prejudicial tipping of the scales occurred in connection with the testimony of the prosecution witness Richard Melville (R. 513, *et seq.*).

Melville's testimony, as mentioned, is treated in detail in the companion petition of Portelli, where the circumstances are brought out which establish (undisputedly, we believe we may say) that Melville's testimony was of the basest order of credibility, and that he was brutally beaten by the police in order to force him to inculpate the defendants. We respectfully join in the argument of Portelli that the testimony of Richard Melville should have been excluded in its entirety by reason of its unlawfully coerced character. However, with particular application to the case of Rosenberg, we also urge as follows in regard to the Melville testimony:

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* The alleged David Goldberg "identification."

The function of the testimony of Melville in this case, from the prosecution's standpoint, was to bring out certain alleged incriminating admissions by Portelli, together with circumstances relating to the alleged flight of Portelli, after the robbery and homicide on May 18, 1962. We take it that it will not be disputed that the prosecution knew perfectly well in advance the story that Richard Melville was going to tell on the stand in this trial. The prosecution must, therefore, have known that Melville's account of Portelli's alleged admissions after the crime included an inculpating reference to Rosenberg. Since these alleged declarations of Portelli were not only after the event, but were altogether pure hearsay as to Rosenberg (who was not present at the alleged declarations), those alleged declarations of Portelli were, of course, absolutely inadmissible as to Rosenberg.* Nevertheless, the prosecution so designed its direct examination of Richard Melville as to have this inadmissible item concerning Rosenberg accidentally pop out, as it were, for the Jury's attention. Doubtless also because of the importance which the prosecution attached to the testimony of Richard Melville, the prosecution seems to have gone to special pains to develop a "show case" sort of preliminary background for that testimony by taking the witness through a rather lengthy introductory direct examination on numerous non-essential details, all with a view, obviously, we suggest, to orienting the Jury's minds in favor of the supposed "realism" of Richard Melville's

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* *Delli Paoli* v. *United States,* 352 U.S. 232, 239-241, and the dissenting opinion at 246-248; *Gambino* v. *United States,* 100 F. 2d 140 (C.C.A. 3, 1940); *People* v. *Robinson,* 13 N.Y. 2d 296; *People* v. *Fisher,* 249 N.Y. 419; Annotation, 1 L. Ed. 2d 1720 ("Admissibility As Against Conspirator of Extra Judicial Declarations of Co-Conspirator").

testimony. See R. 513-520 for this preliminary direct examination of Richard Melville which we claim was transparently designed to impart an air of synthetic naturalistic credibility to his testimony as a whole.

The real strategic purpose of the prosecution in all of this preliminary direct examination of Melville with its contrived air of verisimilitude, was revealed commencing at R. 520, where Melville began his description of Portelli's alleged admissions (made, allegedly, in Melville's home on the two days succeeding the commission of the crime). According to Melville, Portelli said he "could still hear the ringing in his ears," that "I panicked" (when asked why he had dropped the gun), and that he "only got 300" of the robbery loot (R. 520-521). Further according to Melville, Portelli was then asked (by one Lino, in Melville's presence), "What happened to the rest?" (R. 521). What came next—and what the prosecution must have well known was coming next—was the following (allegedly said by Portelli), "I took it out of the register * * * Jerry took the rest" (R. 521). Here, then, was the bombshell which was designed to blow up the chances of Rosenberg for a fair trial before the Jury—a completely improper and illegal hearsay inculpation of Rosenberg which could not but have the fatal result for which it must obviously been designed by the prosecution.

We contend that at that instant in the trial the Court should have immediately acted, *sua sponte*, to order a mistrial, notwithstanding the failure of defense counsel to do so. No corrective admonition to the Jury could conceivably undo the fatal prejudice of Portelli's above quoted inculpation of Rosenberg (see our last preceding footnote herein).

Instead of ordering a mistrial, however, the Court went through an elaborate "admonition" lecture to the Jury, in which the real net effect was to tighten the noose still more surely around Rosenberg's neck, thanks to the quite artful "instructional" language resorted to by the Trial Judge. Here is how the admonition to the Jury began (R. 521-522):

> "The Court: Wait a minute. Madam and gentlemen of the jury, I am going to ask you to pay strict attention to what the Judge is saying. Whatever Baldy* or Portelli said about somebody else, not he, is not binding on the somebody else.
>
> "Now, we heard here from the witness that the defendant Portelli said that *the defendant Rosenberg or Jerry got the rest. Is that correct?*
>
> *"The Witness: Yes, sir.*
>
> "The Court: Now, I instruct you in simple English that that is not the slightest bit of evidence in Rosenberg's case. It applies only to Portelli. Do you follow me. He could have said there Judge Leibowitz got the rest. That would be no evidence against Judge Leibowitz, what he said to somebody out there. What he said about himself may be considered by the jury, but not what he said about somebody else, and whether the somebody else is Rosenberg or Judge Leibowitz or the District Attorney or one of the lawyers who are trying the case, there is no evidence against any of us. Nor is this evidence against Rosenberg.
>
> "It may be considered only as against the defendant Portelli. That is the law.
>
> "Now, Mr. Foreman, I am going to ask you specifically, each one of you, did you understand what I said?" (Emphasis added)

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* "Baldy" is Portelli.

The above ostensible "admonition" to the jury deserves a rather close reading. Note how, to begin with, in the first of our above italicized items, the Court makes very sure that the Jury will understand perfectly well that the alleged reference to "Jerry" is to the defendant Rosenberg in this case—Melville's testimony in itself had not clinched this, but the Judge clinched it very well indeed. Second, note how the Court, not content with having elevated Melville's non-explicit words to the status of an explicit inculpation of Rosenberg, went on further in the next breath to drive the point home still more insistently by turning to say to the witness "Is that correct", to which the witness of course compliantly replied "Yes, sir" (R. 521-522). Having thus quite nicely tightened the noose around Rosenberg, the Court then went on with its "above the battle" judicial-seeming admonitory instructions to the Jury, then the Court went on to play out the further mummery of interrogating each of the Jurors individually as to whether each one of them "understands my instruction", "do you understand it clearly" "can you follow it", etc. (see the portion of the minutes at R. 522-525, which follows immediately after the conclusion of the item which we have above quoted).

But the Trial Judge was still not quite finished with his ostensibly high-purposed attentions to this matter. During the Court's above mentioned melodramatic interrogation of each of the Jurors individually, one of the Jurors happened to say that he understood the Court's admonitions, "but would you go back about three questions. He [Melville] dropped his voice and I lost track of what he said" (R. 524). To this the Court replied (with alacrity), "I am going to have it all read * * *" (R. 524). The Court then

continued its individual interrogation of the Jurors, and then, at R. 525 the Court said "One of the Jurors said that he did not quite catch what this witness said, and I am going to ask you to read, what was said there in the room * * *". *Thereupon the Court had the reporter re-read every word of Melville's above noted testimony concerning Portelli's alleged admissions, including, once again, the atrociously prejudicial item to the effect that "Jerry took the rest"* (R. 525-527) (Emphasis supplied).

The above conduct of the Trial Judge in relation to the Richard Melville testimony of Portelli's alleged inculpation of "Jerry" was inexcusable, the more so because it was entirely and easily avoidable.

In devoting so much attention to the Trial Court's prejudicial conduct in connection with the Melville testimony, we trust that we have not diverted attention from the fundamental injustice of the reception of this testimony at all in view of the police brutality without which, Melville uncontradictedly said, he would not have told the police the story.* The companion petition of Portelli notes that, while there is no authority directly in point on the admissibility of such coerced testimony of a non-defendant witness, the exclusion of such testimony would comport with the due process philosophy expressed in decisions of this Court which have dealt with related aspects of police coercion. This capital case is a proper vehicle, we submit, for announcement by this Court of a rule of constitutional fairness and decency which would put policemen on notice

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* As previously noted, this last statement of Melville was mentioned in the *per curiam* opinion below (Appendix A hereto, *infra*).

that such official savagery will not be countenanced in the investigation and preparation of criminal cases.*

II.

Occasionally in the legal or judicial history of a nation or a society the name of a particular judge becomes associated with some distinctive feature of the judicial processes of an era. In our time, in the State of New York, we have the distinctive juridical phenomenon known as the "Judge Leibowitz charge" to a jury. The Trial Judge in this case was the Honorable Samuel S. Leibowitz, Justice of the Supreme Court of New York, Kings County, a jurist of widespread and vivid reputation beyond the confines of his own State.

What is a "Judge Leibowitz charge"? For persons who have had occasion to read a fair number of "Judge Leibowitz charges", it is not difficult to recognize some of the basic characteristics of the phenomenon in question. A "Judge Leibowitz charge" is seldom, if ever, overtly or declaredly or explicitly unfair to a criminal defendant. On the contrary, a "Judge Leibowitz charge" is saturated with the explicitly declared avowals of the Judge to the Jury that his own spirit of fairness and his own freedom from prejudice about the case are matters of the intensest earnestness on the part of the Judge—so much so, indeed, as to cause discerning readers, in the subsequent leisure of per-

* The only authority to the contrary cited by the Court below is, as mentioned, §815 of *Wigmore* (pp. 230-231). This is one of Professor Wigmore's characteristic magisterial pronouncements for which no authority is cited by him which remotely reaches the kind of fact-situation of police savagery here involved, all of Professor Wigmore's cases involving no more than threats or inducements to accomplice witnesses.

using the printed record, to wonder whether Judge Leibowitz regards it (or wants his juries to regard it) as a unique or exceptional virtue in a judge that he should be fair-minded and unprejudiced. Or, perhaps, the more realistic way of describing the reaction of the discerning reader to a "Judge Leibowitz charge" is to say that the reader comes away with the nagging impression that the Judge "doth protest too much." Indeed, as one proceeds into a more detailed analysis of a "Judge Leibowitz charge"—the charge in the present case classically exemplifies the suggestions which we are here developing, as will shortly appear—the evidences of just such excessive protestation of the Judge's impartiality become more and more unmistakable. Such analysis of a "Judge Leibowitz charge" reveals, among other things, the following: There is usually present, in one manner or another, some adroit judicial maneuvering of the rule of reasonable doubt, the inevitable effect of which is to reduce drastically the benefit of that rule for the defense. There is also present, under the purport of a marshalling of the evidence, what amounts in net effect to a second summation for the prosecution—done, to be sure, with a sufficient subtlety so as to raise a good likelihood that the Honorable Judge in question will have the satisfaction of having been proved right in his familiar and charming prediction to defense trial attorneys that "I am going to see to it that you will not get away with your Point XII or XV or XX in your appeal brief," or words to that effect. In short, the main characteristic of a "Judge Leibowitz charge" is that its effect is to help convict the defendant in an atmosphere of declared judicial impartiality.

It is our respectful submission in this proceeding that the occasion is presented, in this death case of Jerome Rosenberg, for this Court to inquire, in the interests of preserving the principles of constitutional liberty and of authentic judicial impartiality, whether the phenomenon vernacularly known among the Bench and Bar of the State of New York as the "Judge Leibowitz charge," is intrinsically offensive to due process and to proper judicial administration, because in and of itself the very circumstance that a judge's charge to a jury in a criminal case is demonstrably designed in its entirety to produce a conviction of the defendant, cannot be countenanced.

The "hanging charge" which was given to the Jury in this case was itself, in turn, but the logical culmination and fulfillment of certain antecedent devices of judicial artfulness on the part of the Trial Judge herein during the conduct of the trial. The improper judicial conduct of which we here speak, then, encompasses both the Trial Judge's conduct of the trial as a whole, and his charge to the jury; so that, we are speaking of what may aptly be termed not only a "Judge Leibowitz charge" but also a "Judge Leibowitz trial."

In our discussion, *supra,* of the Trial Judge's artful handling of the coerced Richard Melville testimony in relation to Rosenberg, a prime example of the conviction-oriented techniques of a "Judge Leibowitz trial" was revealed. Let us now note how Judge Leibowitz oriented this trial in the crucial matter of the alleged identification testimony against Rosenberg.

That a man should be sentenced to electrocution for felony-murder in a case so thinly "proved" as was this

case, is shocking. The direct evidence against Rosenberg, i.e., the evidence that he was (allegedly) in fact present at the robbery which resulted in the killing of the two detectives, consists, literally and solely, of the "identification" testimony of the witness David Goldberg—who, it will be recalled, said merely that for a brief instant he had seen Rosenberg's face when the latter had the handkerchief or cloth slightly removed from his face at one fleeting juncture of extraordinary excitement and distraction. All of the other evidence relating to Rosenberg was, in the dilutest sense of the term, "circumstantial"—i.e., the generalized and vague "testimony" of Louis Ferrara and Linda Manzione* about some alleged planning of, or driving in an auto for the purpose of, a holdup or robbery to be done somewhere, the testimony of the several "neighborhood" witnesses who said they saw someone running in the neighborhood of the Brooklyn robbery who would have fitted (generally) the physical description of Rosenberg, the testimony about Rosenberg's having purchased clothing, etc.

It should not be lost sight of for one moment, we respectfully submit, that this is not a case of alleged premeditated murder by Rosenberg, but it is a case of felony murder—in which, moreover, there is presented that peculiarly anguishing situation of a defendant who did not do the killing but who nevertheless faces that hapless doom decreed under the Draconic felony murder law of New York. That a man *properly convicted* should be sentenced to electrocution for such a remote and consequential involvement is not, one is

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* This young lady's testimony was later recanted by her, and then the recantation was in turn recanted (Supplemental Record on Appeal, pp. 1-31, *passim;* R. 884-904, 931, 937, 981-982, 992-993).

unhappily obliged to acknowledge, contrary to the statutory law of the State of New York. But we cannot believe that this would allow a felony-murder conviction of the *present sort* to stand, i.e., where the entire evidential basis of the judgment turns indispensably upon "identification" testimony plus so-called "circumstantial evidence" of the quality involved in the present case, and where the record reveals such artfully conviction-designed instructions of the Trial Court to the Jury on the all-important issue of identification.

It is hardly necessary to cite authorities for the proposition, that, especially in this capital case, the Jury should have been instructed, on the issue of identification, that they should have taken into account whether the supposedly identifying witnesses saw the person merely momentarily or very briefly and at a time when the witness had no opportunity to exercise a complete and careful scrutiny; or that the supposed identifying witness, acting upon a rather small foundation of brief meeting and rapid observation, had reasoned himself, even though perhaps conscientiously, into a belief that the defendant was the man whom he saw; or whether such alleged identification was the result of a conclusion thus later developed by the supposed identifying witness and clouded by more or less doubt and uncertainty, rather than being an identification based upon reliable and decisive observation carried by a definite recollection of the witness to a conclusion by the witness whose correctness admits of no reasonable doubt. These instructions which we claim should have been given to the Jury—and were not (*infra*)—are obviously of the most acute importance in a case like this one where the charge is first degree murder that can result (and has) in

a sentence of death. Our foregoing suggestions as to the way in which the Jury should have been instructed in this case are adapted, primarily, from the language of *People* v. *Klvana*, 241 N.Y. 481. See also *People* v. *Seppi*, 221 N.Y. 62; *People* v. *Davino*, 284 N.Y. 486; *People* v. *Davino*, 288 N.Y. 423; *People* v. *Woltering*, 275 N.Y. 51.

We are obliged to quote in full the rather lengthy charge of the Trial Court herein on identification (R. 1367-1370):

> "Three people come here with identification evidence. Who are these people? The two Goldbergs and Mrs. Izzo. They are the only people who offer any identification after the alleged crime was committed—no, I should say during and after the time the alleged crime was committed. You will take each witness and decide whether or not the witness is truthful. Of course, unless you are satisfied beyond a reasonable doubt that you are dealing wtih a truthful witness, again I say, take his testimony and throw it into the wastebasket. Is the witness an honest man? Is Mrs. Izzo an honest woman? Is there any valid reason to doubt the sincerity of the particular witness under the general rules about credibility? Is the witness a truthful witness? Let us assume that you find that the witness is an honest witness. Then what? The second question that must be answered, and it is an important question, is whether the identification is accurate, whether it is reliable. In that regard you must consider all of the circumstances under which the identification was made. You must consider the opportunity that the particular witness had to observe the culprit at the time of the commission of the alleged crime; for how long a period was he under observation; how close did he get to the witness; what was the condition of the light?

Here is something important. Is the culprit's countenance such as would make a definite impression upon the mind of a witness? Do you know what that means? Is the face of a man the kind of a face that, figuratively speaking, would be 'lost in the shuffle,' lost in the mob, an ordinary face? Sometimes there are ordinary faces and sometimes there are faces that stand out, that one would be likely to remember. It is an important item.

You have seen these two defendants sitting here throughout the entire trial. Of course, the observation that was made there at the time was for a very short period of time; but you have seen the faces of these men. You have seen their stature when they stood up to leave the courtroom or when they were brought into the courtroom. Are their faces the kind of faces and their builds the kind of builds that a person is likely to remember; are they the types of individuals who are going to make an impression on the person who looks at them? That is an important think to take into consideration.

How about the individual himself, the person who is testifying? What kind of a person is that person? What is his background? What has been his experience in looking at and dealing with people? That is an important consideration. It is not conclusive, but it is something that a jury may take into consideration.

Who are these Goldbergs? What is their business? What kind of people are they? You have seen them on the stand. Are they rash or are they people who are careful in what they say? Take the lady. You are the sole judge as to her credibility. I am not telling you to believe her. I am not telling you not to believe her. The lady told us that she was a salesgirl and that she was also a cashier. It is for you to say

whether, in the light of her background, she is a person who was capable of observing people and remembering faces. Of course you must consider the circumstances that were then and there present. I am submitting all these questions to you. I am not stating my opinion one way or the other as to what you should do with the testimony.

Members of the jury, you must also consider upon the question of accuracy, the length of time which intervened between the date of the crime and the occasion when the witness saw the particular defendant at the time of the arrest, as having some bearing on the probability that he could remember the face of the defendant after such a lapse of time.

You must also take into account the witness' own capacity for observation, and his memory, and all other tests and standards which you may deem of importance, in addition to those which I have already enumerated.

I am not laying down any hard and fast rules for you as to identification. You have got to use your common sense. You people are people from a cosmopolitan community. You don't come from some hinterland, from some mountain retreat. You rub shoulders with your fellow man every day of your lives. You are people of experience. Now it is entirely up to you to apply such standards as you deem proper in judging as to the identification that was made by each of these witnesses, and of the particular defendant under consideration.

I charge you in the most forthright terms at my command, that there is the necessity for the use of the utmost caution and the utmost precaution in weighing proof as to identification. It must be with sufficient certainty so as to preclude every reasonable possibility of mistake. So much for the identifications."

The above quoted instruction on identification is a fascinating instance of the "Judge Leibowitz Charge". Observe the manifold artfulness of the above quoted instruction on identification. To begin with, by a process of verbal elision, the Jury are told that identification testimony came from "the two Goldbergs and Mrs. Izzo". To be sure, the Jury had previously been told, some pages farther back, that only one of the Goldbergs had identified Rosenberg, and that Mrs. Izzo had identified him as having been running in the neighborhood after the crime was committed, but now the Jury are told that "three people came here with identification evidence * * * the two Goldbergs and Mrs. Izzo". *Second,* observe the obviously rhetorical nature of the questions which the Judge invites the Jurors to ask themselves—"Is the witness an honest man? Is Mrs. Izzo an honest woman? Is there any valid reason to doubt the sincerity of the particular witness under the general rules about credibility?" *Third,* using the portentous prefatory words, "Here is something important", the Court goes into an obviously "hinting" invitation to the jury that they should bear in mind the supposedly or allegedly distinctive type of features or facial countenance of the defendant Rosenberg. *Fourth,* how eminently "fair" to "both sides" is this following treatment in this typical "Judge Leibowitz Charge"—"Of course, the observation that was made there at the time was for a very short period of time; but you have seen the faces of these men * * *. Are their faces the kind of faces and their builds the kind of builds that a person is likely to remember * * *. That is an important thing to take into consideration." *Fifth,* this patently conviction-inducing jury "instruction" on

"identification" intones supposedly objective questions as to the qualifications of the observing or identifying witnesses—"What has been his experience in looking at and dealing with people? That is an important consideration * * *. Who are these Goldbergs? What is their business? What kind of people are they? You have seen them on the stand. Are they rash or are they people who are careful in what they say? Take the lady * * *. The lady told us that she was a salesgirl and that she was also a cashier. It is for you to say whether, in the light of her background, she is a person who is capable of observing people and remembering faces."

When a jury is given, by the prestigious authority of a Trial Judge (who happens moreover to be a nationally famous judicial personage in his own time), this sort of "hidden-persuader" or "subliminal" kind of conviction-inducing instructions, is it realistic to expect that the jury will preserve their independence of judgment and mind by the Judge's lip-service use of such perfunctory expressions as "you are the sole judge as to her credibility. I am not telling you to believe her," or, "It is not conclusive, but it is something that a jury may take into consideration", or, "I am submitting all these questions to you. I am not stating my opinion one way or the other as to what you should do with the testimony", or, "I am not laying down any hard and fast rules for you as to identification". Nor is it any more likely that such a Jury, subjected to such a masterly piece of judicial brainwashing, would be particularly deflected from its compliancy with the Judge's own seeming preference by the *pro forma* words at the end of the charge on identification, to the effect that the Jury must use "utmost caution", etc., in determining the issues of identification.

It is submitted that Rosenberg was denied a fair due process trial on the crucial issue of his identification as an allegedly guilty participant in the crimes charged.

III.

The decision of the Court of Appeals of the State of New York which is here being sought to be reviewed was rendered on March 11, 1965. On April 5, 1965 this Court decided *Pointer* v. *Texas,* U.S. , 13 L. Ed. 2d 923 and *Douglas* v. *Alabama,* U.S. , 13 L. Ed. 2d 934, making applicable to the States for the first time, *via* the Fourteenth Amendment, the Sixth Amendment obligation of according to criminal defendants the right of confrontation of accusing witnesses. In our description *supra* of the Richard Melville testimony of alleged extra-judicial admissions by the co-defendant Portelli which allegedly inculpated petitioner Rosenberg as well, we noted that the admonition to the Jury that Portelli's admissions were not binding as to Rosenberg were not only intrinsically ineffective,* but in fact seemed to have been unmistakably calculated to accomplish exactly the opposite, namely, to "rub it in" that Portelli had allegedly inculpated "Jerry" (i.e., Rosenberg). In these circumstances we respectfully invoke the rule of the *Pointer* and *Douglas* cases, *supra*—especially the latter, whose facts significantly resemble ours as respects denial of the constitutional right of confrontation. For in *Douglas* the prosecution effectively brought to the Jury's attention an out-of-court confession of an accomplice as to whom, this Court found, the defendant on trial

* For the reasons so vigorously noted in the dissenting opinion in *Delli Paoli, supra.*

did not have a proper constitutional opportunity of confrontation or cross-examination. Likewise in our case Rosenberg of course had no such opportunities in regard to the alleged extra-judicial admissions by Portelli as testified to by Melville. Portelli did not take the stand in this case.

Not only, then, do we earnestly believe that the rule of the *Pointer-Douglas* cases is fairly applicable to this case of Jerome Rosenberg—which, moreover, is a death sentence case as neither *Pointer* nor *Douglas* were—but indeed we think that, in an overall due process aspect, our case calls the more compellingly for the applying of the *Pointer-Douglas* rule when it is remembered that the entire business of the alleged Portelli admissions came into the record of this trial only through the atrocious circumstance of the witness Melville's having been savagely tortured by the police in the first instance to get him to give a pretrial statement which he swore on the stand in this trial he would never have given if he had not been thus brutally coerced. The combination of these extraordinarily offensive features —the police beating of the witness Melville, the denial of the right of confrontation, and the sly way in which Rosenberg was deprived of the benefits of the rule of non-bindingness as to him of Portelli's alleged hearsay admissions— cries out for certiorari redress in the interests of Fourteenth Amendment due process.

IV.

Certiorari is merited here also by the circumstances of the selection of the trial jury, which we respectfully contend was selected by an unconstitutional procedure aimed at excluding persons who might have a truly objective atti-

tude about a recommendation of mercy in the event of a conviction of felony murder and, specifically further, to exclude jurors of the same ethnic or racial background as the defendants.

(The typewritten stenographic minutes of the *voir dire* of the prospective trial jurors in this case are a part of the certified record herein. Our discussion below will refer to the pages of the typewritten minutes as "S.M. ".)

The *voir dire* in this case was most unusual. The questioning of the prospective jurors by the prosecutor and the Court displayed a most peculiar pattern in regard to the matter of conscientious scruples about the felony murder death sentence for defendants who did not do the actual killing. In the first place, there was a really extraordinary amount of such questioning in this *voir dire,* but of perhaps greater interest is the fact that this excessive questioning seemed to occur above all whenever the prospective juror happened to be of apparently Jewish or Italian extraction. The conduct of the prosecutor and the Court in this *voir dire* seemed to have a two-fold purpose, namely, to pack the Jury with persons who could be counted upon to be inclined against a recommendation of mercy under a verdict of felony murder, and to keep off the jury Jews and Italians upon an ostensible showing that they entertained conscientious scruples about the felony murder death sentence—after the Jewish and Italian prospective jurors had been subjected to especially prolonged and intense questioning on that subject.

Rather than to engage in further characterization of this remarkable *voir dire,* we invite this Court to see the pertinent details of the situation for itself, and in order to make

this more convenient for the Court we are setting forth below a summary of the examination of each prospective juror, with page references to the stenographic minutes:

In the Court's preliminary questioning of the first panel of talesmen, persons having any conscientious scruples against the infliction of the death penalty were directed to come forward; we note that the Court repeated this question six times, observing that each time the question was asked more persons were coming forward (S.M. 35-36). Right after this the Court further interrogated several of the talesmen who had come forward on the ground of the above mentioned conscientious scruple, all in the presence of the panel (S.M. 36-44). Then the Court again interrogated the entire panel at large on this subject (S.M. 44-45).

As an indication of the thoroughness—to say the least—with which the Court had thus gone about weeding out from the panel any person who might really fall under the statutory ban as regards such conscientious scruple*, we note that the defense felt it necessary to object to "the excessive repetition and the manner in which the Court asks this question concerning this point" and a motion was made for the discharge of the panel and a mistrial (S.M. 46).

We are calling attention to this extraordinary thoroughness of the Court's advance weeding-out of the panel, because this helps to underscore, we believe, the later prejudice that occurred when numerous additional talesmen were rejected in circumstances plainly indicating that the prosecution and the Court did not want them for fear that they might be open-minded on the question of a recommendation of mercy under a felony murder verdict.

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* N. Y. Code Crim. Proc., §377.

At S.M. 57-59 the prosecutor, in examining the first talesman, Charles Jensen, went through a detailed interrogation to make sure that the talesman would be willing to convict, in a felony murder prosecution, co-defendants who did not do the actual killing. Jensen was excused for reasons of health (S.M. 65).

Talesman Ian J. Cook was challenged for cause on the ground that he said that he would have difficulty applying the felony murder law against defendants who did not do the killing. Talesman Howard S. Hale was challenged for cause by the Dellernia defense as having formed an opinion from newspaper reading (S.M. 71-106). Octave H. Westbrook was accepted on the jury (S.M. 106-145). He was agreeable to applying the felony murder law (S.M. 109-111). Harold N. Youngleib was peremptorily challenged by the People, evidently because one of the defense attorneys was acquainted with a cousin of Mr. Youngleib (S.M. 146-147). Raymond I. Wilkinson was challenged for cause by the Dellernia defense on the ground of newspaper knowledge, and this challenge being overruled, Wilkinson was peremptorily challenged by the defense (S.M. 147-176).

(To avoid repetition, we are refraining from mentioning that nearly every talesman was being asked throughout by the District Attorney about his willingness to apply the felony murder law.)

Thomas G. Weber was accepted for the Jury (S.M. 177-190); he was willing to apply the felony murder law (S.M. 178). Israel Wertenthiel was peremptorily challenged by the People without even being questioned by them (S.M. 192-195). Dorothy Williams was peremptorily challenged by the People before questioning by any party (S.M. 195).

William Kastner, although he said he would apply the felony murder law (S.M. 199) and swore that he had no questions and no hesitation about the death penalty (S.M. 202), was peremptorily challenged by the People (S.M. 196-213). Stanley Kesnoskie was peremptorily challenged by the defense (S.M. 213-222). Andrew F. Finch, Jr., was challenged for cause by the defense on the ground of newspaper knowledge, this challenge was overruled, and the defense peremptorily challenged Mr. Finch (S.M. 222-235). William L. Siegel, was peremptorily challenged by the People after only a brief and perfunctory questioning by them (S.M. 235-239). Edwin S. Thurber was peremptorily challenged by the defense (S.M. 239-244). Bernard Schwartz, after saying that he would give special credence to police witnesses, was excused by the Court (S.M. 245-246). Ernest Nason was peremptorily challenged by the defense (S.M. 247-257). John J. Condon was peremptorily challenged by the defense (S.M. 258-277). William A. McCaa was accepted for the Jury (S.M. 278-287). Otto H. Shneeloch was peremptorily challenged by the defense (S.M. 287-291). Thomas L. Clevenger was accepted for the Jury (S.M. 291-308). Mrs. Ethel Taylor was peremptorily challenged by the People (S.M. 308-309). Henry Banks was peremptorily challenged by the People (S.M. (309-310). Renee H. Sachs was peremptorily challenged by the People (S.M. 311-312). John J. McKenna was peremptorily challenged by the defense (S.M. 312-322). Michael Feinbloom was peremptorily challenged by the People after short, perfunctory questioning (S.M. 322-323). Clayton H. Ward was peremptorily challenged by the defense (S.M. 331-347). Irving O. Sager was peremptorily challenged by the prosecution (S.M. 347-348). Alex-

ander J. Mitchell was excused by consent as being a friend of an Assistant District Attorney (S.M. 348-350). Robert S. Burch was accepted for the Jury; he was willing to apply the felony murder law (S.M. 350-360). Michael S. Cassidy was peremptorily challenged by the defense (S.M. 360-367). Julia M. Walworth was peremptorily challenged by the People (S.M. 367-368). John J. Guiliano was peremptorily challenged by the People after short perfunctory questioning (S.M. 368-371). William H. Meyer was peremptorily challenged by the defense (S.M. 371-372). Lewis Burns was peremptorily challenged by the defense (S.M. 372-378). Francis J. Mooney was excused by the Court after saying that he felt prejudiced against the defendants (S.M. 378-379). Ethel Katz was challenged for cause by the People on the ground that she expressed a conscientious scruple against applying the felony murder law to defendants who did not do the killing; we note that the District Attorney and the Court seem to have made a particular point of questioning Mrs. Katz on this subject (S.M. 380-385). Willis G. Gooding was peremptorily challenged by the People after short perfunctory questioning (S.M. 386). Robert Wilde was challenged for cause by the People when he expressed a conscientious scruple about applying the felony murder law to a defendant who did not do the killing (S.M. 387-390). William R. Gottschalk was peremptorily challenged by the defense (S.M. 390-397). Peter A. Solen was challenged for cause by the People on the ground that he had a conscientious scruple against applying the felony murder law death sentence to a defendant who did not do the killing; the questioning of Solen, by the prosecutor and the Court was very persistent, even though he said that he would follow the law if that

was his duty (S.M. 397-404). Charles F. Callahan was peremptorily challenged by the defense (S.M. 404). Henry Gross after being asked by the Court about his scruples in regard to the felony murder law death sentence problem, the questioning being in a form pretty plainly calculated to arouse almost anyone's scrupulous concern, was peremptorily challenged by the People even though he said his conscience would not prevent him from applying the law. The defense particularly objected to the way in which the Court questioned Mr. Gross on the ground that the questioning appeared to be designed to elicit cause. See S.M. 404-409. Albert J. Okas was peremptorily challenged by the defense (S.M. 409-416). Joseph B. Kaufman was peremptorily challenged by the People even though he was willing to apply the felony murder law (S.M. 417-427). Herbert O. Siermann was peremptorily challenged by the defense (S.M. 429). Charles W. Hubener was peremptorily challenged by the defense (S.M. 430-438). Edward Miller was peremptorily challenged by the defense (S.M. 438-442). Edwin J. Meiners was challenged for cause by the defense on the ground of a possibly prejudiced attitude, the challenge was overruled, and the defense challenged him peremptorily (S.M. 442-454). George F. Libity was excused by the Court when he said he placed special credence in police witnesses (S.M. 454-465). Irwin Belsky was challenged for cause by the People when he expressed reservations about the felony murder law after the type of questioning that was now becoming familiar in this voir dire (S.M. 466-469). David Baclini was challenged for cause by the defense on the ground that he had formed an opinion (S.M. 470-478). John N. Styffe was challenged for cause by the defense on the ground that he had an adverse opin-

ion, the challenge was overruled, and the defense challenged him peremptorily (S.M. 478-484). Joseph J. Sicignano was challenged for cause by the People on the ground that he had reservations about the felony murder law, the defense objecting that he had expressed his willingness to follow the law, the Trial Judge having "worked over" this prospective juror, which resulted in evoking some further expression of conscientious hesitation about the felony murder law. The defense objected to the Court's conduct (S.M. 484-495). Joseph P. Redmond was accepted for the Jury (S.M. 495-500). Anthony R. Caldararo was peremptorily challenged by the People even though he was willing to uphold the felony murder law, the prosecutor in this instance showing a really extraordinary persistence in trying to break down the prospective juror, the defense objecting vigorously to this conduct (S.M. 500-506). Jerome Pleech was peremptorily challenged by the People even though he was sure he was willing to uphold the felony murder law (S.M. 506-510). William K. Ryan was accepted for the jury, the prosecutor's questioning being short and perfunctory (S.M. 510-518). John J. McKullen was challenged for cause by the defense when he expressed special credence of police witnesses (S.M. 518-520). Edwin T. Howe was challenged for cause by the defense as evincing a prejudiced attitude, the challenge was overruled, and the defense was obliged to use a peremptory challenge (S.M. 520-526). Louis Lombardi was peremptorily challenged by the People even though he was willing to uphold the felony murder law (S.M. 526-530). William T. VonGlahn was accepted for the Jury; the prosecutor did not even ask him about the felony murder law (S.M. 530-537). Winifred K. Herrmann was peremptorily challenged by the People even

though she was willing to uphold the felony murder law, the defense objecting to the excessively persistent questioning by the prosecutor on this subject (S.M. 537-543). Alfred Eyer was accepted for the Jury without being questioned by the prosecutor on the felony murder law (S.M. 552-560). Walter E. Halloran was peremptorily challenged by the defense (S.M. 560-564). William V. Raccioppi was peremptorily challenged by the People; he had expressed some hesitation about the felony murder law, but after a lengthy colloquy with the Court he had said he would uphold the law (S.M. 564-574). William E. Herron, Jr. was peremptorily challenged by the defense (S.M. 574-580). Benjamin E. Gewertz was peremptorily challenged by the People. The stenographic minutes of the voir dire of this prospective juror show in an especially striking way the unfolding pattern of the prosecution, aided by the Court, to keep off this Jury persons of Jewish and Italian birth through the device of excessive questioning about the felony murder law. The defense vigorously excepted and moved for a mistrial on these grounds (S.M. 580-590). Heino A. Pohjola was peremptorily challenged by the defense (S.M. 590-596). Richard Chezar was challenged for cause by the People on the ground of conscientious scruples (S.M. 596-602). Walter L. Larkin, Jr. was challenged for cause by the defense on the ground of friendship with police officers (S.M. 602-606). Estelle Sauter was accepted for the Jury; she was willing to uphold the felony murder law (S.M. 606-617). Edward S. Kilanowski was excused by the Court when he said that he had an opinion about the case (S.M. 618-620). Rudolph Coriaty was challenged for cause by the People, over defense objection, and after another of those grilling interrogations

about the felony murder law (S.M. 620-637). Thomas V. Fitzgerald was excused because of friendship connections with the Police Department (S.M. 637-640). Fred B. Young was peremptorily challenged by the People even though he was willing to uphold the felony murder law (S.M. 641-647). Alfred E. Berry was challenged for cause by the People when he expressed hesitations about capital punishment (S.M. 647-656). Charles E. Nelson was peremptorily challenged by the defense (S.M. 656-672). William M. Van Velson was peremptorily challenged by the defense (S.M. 676-683). Howard K. Earle was challenged for cause by the defense on the ground that he would tend to doubt the credibility of witnesses with an unfavorable background (S.M. 684-707). Helen R. Lynch was challenged for cause by the People when she betrayed doubt and confusion about applying the felony murder law (S.M. 707-715). Theodore Schumach was challenged for cause by the People when he said he would have reservations about applying the felony murder law; defense counsel objected, saying "I would like to point out the insidiousness of this special voir dire. These questions have never been given to any of the Jurors who were sworn in again, and I venture to say that if it were given to the men who were sworn in, they would answer the way the men did who were rejected" (S.M. 717; and see S.M. 715-717). Casimir Cogujsza, Jr. was challenged for cause by the People after he finally expressed a hesitation about the felony murder law following persistent questioning by the District Attorney (S.M. 718-725). Arthur H. Friese was accepted for the Jury; he was willing to apply the felony murder law "without reservation" (S.M. 725-734). Frank W. Boehm was peremptorily challenged by the defense (S.M. 734-

742). William H. Ehrlich was challenged for cause by the People on the ground of his hesitation about applying the felony murder law after another of those interrogations to which the defense had been objecting (S.M. 743-746). John R. Winters was challenged for cause by the People after another such questioning which, we contend, was so plainly designed to weed out persons who might favor a recommendation of mercy in a felony murder case (S.M. 746-751). Charles H. Clarke was challenged for cause by the defense on the ground that he doubted the innocence of the defendants (S.M. 751-759).

Following the above, a new panel of jurors was brought in (S.M. 759). The Court preliminarily weeded out, as previously, all persons who said they had a conscientious scruple about the death penalty (S.M. 776-778). The voir dire examination of talesmen was then resumed.

Richard G. Sylva was accepted for the jury; he was willing to apply the felony murder law (S.M. 803-815). Robert P. Grogan was challenged for cause by the People when he expressed reservations about the felony murder law after another of those questionings of the type above mentioned (S.M. 815-819). Harry Charnicoff was peremptorily challenged by the People even though he said he was willing to apply the felony murder law (S.M. 820-823). Edward J. Stevenson was peremptorily challenged by the defense (S.M. 823-828). James R. Everett was accepted for the Jury; he was willing to apply the felony murder law (S.M. 828-837). Thomas C. Strong was peremptorily challenged by the People (S.M. 840-844). Madison M. Roberts was peremptorily challenged by the defense (S.M. 844-849). John E. Robinson was accepted for the Jury, being the

twelfth juror; he was willing to apply the felony murder law (S.M. 849-855). Myron J. Starr was peremptorily challenged by the People even though he had no "question" about applying the felony murder law (S.M. 857-864). John E. Towner was peremptorily challenged by the defense (S.M. 864-866). Michael F. Coffey was peremptorily challenged by the defense (S.M. 866-871). Frank X. Ricca was challenged for cause by the People when, after the now familiar pattern of questioning, he expressed reservations about the felony murder law (S.M. 871-875). Lawrence T. Raymond was accepted as an alternate juror; he was willing to apply the felony murder law (S.M. 876-883). Eugene P. Young was accepted as an alternate juror; he was willing to apply the felony murder law (S.M. 883-888). George Weinstein was peremptorily challenged by the People even though he was willing to apply the felony murder law (S.M. 888-890). Salvatore P. Timpanelli was peremptorily challenged by the People; he was not even asked by the People whether he was willing to uphold the felony murder law (S.M. 890-893). John H. McDonald was peremptorily challenged by the defense (S.M. 893). Charles Peles was challenged for cause by the People when, after another of those questionings, he expressed reservations about the felony murder law (S.M. 893-897). Peter Gistaro was peremptorily challenged by the People even though he said he would uphold the felony murder law, "No question in my mind" (S.M. 898-907). George E. Gannon was peremptorily challenged by the defense (S.M. 907-911). Bertram F. Cash was peremptorily challenged by the defense (S.M. 911-914). James P. Mone was accepted as the third alternate juror (S.M. 914-916).

We submit that the *voir dire* above described violates the Fourteenth Amendment guarantee to a defendant of a fair and an impartial jury. Cf. *Irvin* v. *Dowd,* 366 U.S. 717; *Brown* v. *Allen,* 344 U.S. 443, cert. den. (*Spiller* v. *Allen*) 345 U.S. 946.

CONCLUSION

Petitioner Jerome Rosenberg respectfully adopts, insofar as applicable to his case, the questions presented and the points urged in support of the granting of certiorari in the companion petition of Portelli.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner
Jerome Rosenberg

APPENDIX A

Opinion of the Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ANTHONY PORTELLI and JEROME ROSENBERG, Appellants.
Decided March 11, 1965.

Per Curiam. The proof adduced upon the trial is more than sufficient to support the jury's verdict that the defendants are guilty of felony murder and, since we find no errors of law, we would have no occasion to write were it not for the testimony of police brutality which the record before us contains.

On May 18, 1962 two police officers, Detectives Luke Fallon and John Finnegan, were shot and killed in Brooklyn during the course of a holdup when they sought to apprehend the robbers. Upon the trial, held in January of 1963, one of the principal witnesses against the defendant Portelli was a small-time criminal by the name of Richard Melville. Called by the People, he testified that the defendant Portelli came to his home (with two other men) on May 20 and completely implicated himself in the homicides, describing how he participated in the robbery, how he shot the police officers and how he managed to get away. On cross-examination, Melville stated that later the same day several detectives took him to a police station for questioning and that, although he first denied knowing Portelli or anything about the crime, he finally told the police the story which he gave in court. But he declared that he did so only after he had been held in custody overnight and severely beaten and tortured and that he would not have talked to the police had they not coerced him in this manner.

However, he insisted from the witness stand that the pretrial statement which he made to the police, as well as his testimony, implicating Portelli was completely true.

It is the defendant's contention that the witness' testimony shoud have been stricken once it appeared that his statement, although given some eight months before the trial, had been coerced by the police.

Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury. (See 3 Wigmore, Evidence [3d ed., 1940], § 815, pp. 230-231.) The requirements of law are met if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open court is truthful and worthy of consideration.

In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melville testified and we simply note that an appropriate forum is available for these charges of misconduct.

Appendix A—Opinion of the Court of Appeals of the State of New York

The judgments of conviction should be affirmed.

Chief Judge DESMOND and Judges DYE, FULD, VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur.

Judgments of conviction affirmed.

APPENDIX B

Judgment of the Court of Appeals of the State of New York—Amended Remittitur

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of March in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,

Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR March 11, 1965.

Filed Mar 26 1965

Sup. Ct. No. 459

The People &c.,

Respondent,

vs.

Anthony Portelli and Jerome Rosenberg,

Appellants.

Appendix B—Judgment of the Court of Appeals of the State of New York—Amended Remittitur

BE IT REMEMBERED, That on the 26th day of December in the year of our Lord one thousand nine hundred and sixty-three, Anthony Portelli and Jerome Rosenberg, the appellants in this action, came here unto the Court of Appeals, by Evseroff, Newman and Sonenshine and Albert C. Aronne, and Maurice Edelbaum, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgments of conviction of the Supreme Court, Kings County. And The People of The State of New York, the respondent in said action, afterward appeared in said Court of Appeals by Edward S. Silver, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William Sonenshine, of counsel for the appellant Portelli, and by Mr. Maurice Edelbaum, of counsel for the appellant Rosenberg, and by Mr. Aaron Nussbaum, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of conviction of the Supreme Court, Kings County, appealed from in this action, be and are hereby in all things AFFIRMED. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed a question under the Constitution of the United States, viz.: Whether the rights of the appellants to due process of law under the Fourteenth Amendment were violated. Appellants contended that their rights were violated (1) by the admission into evidence of the testimony of the witness

Appendix B—Judgment of the Court of Appeals of the State of New York—Amended Remittitur

Richard Melville [see 15 N Y 2d 235] and (2) by other errors in the conduct and rulings at the trial. The Court of Appeals held that no constitutional rights of appellants had been violated.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said Supreme Court.

Therefore, it is considered that the said original judgments of conviction be and are hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court, Kings County, before the Justices thereof, according to the form of the statnte in such case made and provided.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, March 11, 1965.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

Raymond J. Cannon
Clerk

APPENDIX C

Order Amending Remittitur of the Court of Appeals of the State of New York

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-second day of April 1965.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 399

The People &c.,

Respondent,

vs.

Anthony Portelli and Jerome Rosenberg,

Appellants.

Motions to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are granted, the return of the remittitur requested and,

Appendix C—Order Amending Remittitur of the Court of Appeals of the State of New York

when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellants to due process of law under the Fourteenth Amendment were violated. Appellants contended that their rights were violated (1) by the admission into evidence of the testimony of the witness Richard Melville [see 15 NY 2d 235] and (2) by other errors in the conduct of and rulings at the trial. The Court of Appeals held that no constitutional rights of appellants had been violated.

And the Supreme Court, Kings County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball
Deputy Clerk

APPENDIX D

Minutes of Sentence and Order of Execution

Minutes of Sentence (Jerome Rosenberg)

At a Criminal Term of the Supreme Court, held in and for the County of Kings, at the Court House, Civic Center, in the Borough of Brooklyn, City of New York, on the 18th day of February 1963.

Present: Hon. Samuel S. Leibowitz
Justice—Supreme Court

Indictment No. 2484/62

The People of the State of New York

—against—

Jerome Rosenberg

Defendant

Indicted for Murder, first degree, two counts, and convicted on January 29, 1963, on each of the two counts, by a verdict of a jury, of the crime of Murder, first degree, while committing a felony, without a recommendation of mercy.

Being personally present the defendant refused to answer all questions pertaining to his pedigree asked of him by the Clerk of the court.

Appendix D—Minutes of Sentence and Order of Execution

Minutes of Sentence (Jerome Rosenberg)

The defendant and his counsels being present and the defendant being asked if he had any legal cause to show why the judgment of the law should not be pronounced against him, and he having no legal cause, the Court pronounced judgment as follows:

WHEREUPON, it is ORDERED and ADJUDGED by the Court, that the said JEROME ROSENBERG, for the Murder in the first degree, while committing a felony, without a recommendation of mercy, of John Finnegan, whereof he is convicted, be and hereby is sentenced to the punishment of death, and that within ten days from this date the Department of Correction of the City of New York deliver the said JEROME ROSENBERG, together with the warrant of this Court, to the Agent and Warden of the Sing Sing State Prison at Ossining, New York, where he shall be kept in solitary confinement until the week beginning the 31st day of March, 1963, and that upon some day within the week so appointed, the Agent and Warden of the said Sing Sing State Prison at Ossining, New York, shall do execution upon him, the said JEROME ROSENBERG, in the mode and manner prescribed by law.

A TRUE EXTRACT FROM THE MINUTES

JAMES A. KELLY
Deputy and Acting Clerk
of Kings County

Order of Execution (Jerome Rosenberg)

Indictment No. 2484/60

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JEROME ROSENBERG

Defendant

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

To the Agent and Warden of Sing Sing State Prison at Ossining, N. Y.

WHEREAS, at a Criminal Term of the Supreme Court held in and for the County of Kings on the 14th, 15th, 16th, 17th, 18th, 21st, 22nd, 23rd, 24th, 25th, 28th and 29th day of January 1963, the above named defendant, JEROME ROSENBERG, was put upon his trial for Murder in the first degree, of Luke Fallon and John Finnegan, committed in the County of Kings, on May 18, 1962, and upon said trial the said JEROME ROSENBERG having been found guilty by the verdict of a jury of Murder in the first degree, while committing a felony, without a recommendation of mercy, of Luke Fallon and John Finnegan, on January 29, 1963 and on February 18th, 1963 having been sentenced to be put to death for each of the said killings in the manner provided by law on some day in the week beginning the 31st day of March, 1963:

Appendix D—Minutes of Sentence and Order of Execution
Order of Execution (Jerome Rosenberg)

Now it is hereby ORDERED that the execution of the said sentence so imposed upon the said JEROME ROSENBERG, for the murder of the said John Finnegan, be done upon the said JEROME ROSENBERG by you, the said Warden of Sing Sing State Prison, at Ossining, N. Y., in the manner prescribed by law within the walls of the said prison or inclosure thereto adjoining, on some day in the week beginning the 31st day of March, 1963.

WITNESS, my hand at the Borough of Brooklyn, City of New York, County of Kings aforesaid on the 18th day of February, 1963.

SAMUEL S. LEIBOWITZ
Justice—Supreme Court

Given under my hand and attested
by the SEAL of the said Court on this
18th day of February, 1963

JAMES A. KELLY
Deputy and Acting Clerk
—Kings County

APPENDIX E

Statutes Involved

N.Y. Penal Law §1044

"§1044. Murder in first degree defined

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed."

* * * * *

"2. * * * without a design to effect death, by a person engaged in the commission of or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; * * *"

N.Y. Penal Law §1045-a

[As it was in force at the time of the sentencing in this case.]

"§1045-a. Life imprisonment for felony murder; jury may recommend

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life. Added L. 1937, c. 67, §2, eff. March 17, 1937."